84-1330

No.

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IN THE

Supreme Court of the United States

October Term, 1984

HARRIET M. GOULD,
Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
Respondent,

v.

ROBERT L. ISRAEL, et. ux. and
C. WILLIAM BAILEY, et. ux.
Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether a federal court can proceed to adjudicate a removed civil action, not involving any federal question, against non-diverse and diverse citizen co-defendants while a state trial court order dismissing the non-diverse citizen co-defendants is suspended by virtue of a timely appeal to the State Court of Appeals, which said appeal ultimately reversed the trial court dismissal of the non-diverse defendants, and confirmed the lack of complete diversity between plaintiff and all defendants.

(2) Whether a federal court may refuse to follow state court substantive law in violation of 28 U.S.C. 1652 and *Erie Ry.* v. *Tompkins*, 304 U.S. 64 (1938), in these respects:

(a) By refusing to follow the rules of decisions of the highest state court that rejection of insurance benefits based on the suicide exception is unlawful when the insurer does not have evidence to prove suicide to a certainty.

(b) By following a state highest court opinion that has been withdrawn and declared to have no precedential value.

(c) By refusing to use the state Federal Court Local Law Certificate statute to obtain an authoritative statement of local law that is thought to be unclear.

(3) Whether the doctrine of estoppel by judgment precludes a federal court from relitigating the identical local law issue between the same parties that has been resolved by a final state appellate court judgment.

II. PARTIES

Harriet M. Gould, plaintiff, a Washington citizen; Mutual Life Insurance Company of New York (herein referred to as MONY, its public relations acronym), a New York corporation, co-defendant; the marital community of Robert L. Israel and wife, co-defendants, Washington citizens: the marital community of C. William Bailey and wife, co-defendants, Washington citizens.

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Defendants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Harriet M. Gould respectfully prays for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. OPINIONS BELOW

The opinion of the Court of Appeals (App. A1-A5) is reported at 735 F.2d 1165 (1984). The opinions of the District Court of March 1, 1983 and April 29, 1983 (App. B-1 to B-6) are not reported.

II. JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit is dated June 25, 1984. A petition for rehearing was timely filed on July 9, 1984. On September 27, 1984, the

petition for rehearing was denied. On December 14, 1984, the Honorable William H. Rehnquist granted an extension of time for filing this Petition to February 21, 1985. The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. 1254(1).

III. STATUTES AND REGULATIONS

1. 28 U.S.C. 1332. Diversity of citizenship.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between —

(1) Citizens of different states; . . .

2. 28 U.S.C. 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

3. **28 U.S.C. 1652. State Laws as rules of decision.**

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

4. **Washington Consumer Protection Act (WCPA) RCW Ch. 19.86:**

RCW 19.86.020: Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.090: Civil action for damages, treble damages authorized.

Any person who is injured in his business or property by a violation of RCW 19.86.020, . . ., may bring a civil action in the superior court to . . . recover the actual damages sustained by him, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: Provided, that such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars: . . .

5. **Washington Insurance Code, RCW 48.010.030.**

Public Interest: The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon insurer, the insured and their representatives rests the duty of preserving inviolate the integrity of insurance.

6. Washington Federal Court Local Law Certificate Procedure Act, RCW Ch. 2.60: 2.60.020. Federal court certification of local law question.

When in the opinion of any federal court before whom a proceeding is pending, it is necesary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto.

7. Chapter 2.06 of Revised Code of Washington creating Court of Appeals.

RCW 2.06.010 and .030 - See Appendix D.

IV. CONCISE STATEMENT OF THE CASE

Petitioner brought this tort action (*Gould II*) in the state court under the Washington Consumers Protection Act (WCPA) seeking damages from MONY and its attorneys, Israel and Bailey, for the rejection, without reasonable justification, of her claim for the $25,000.00 benefits on a MONY policy on her husband's life. That rejection had forced petitioner to have to file suit to recover the policy proceeds (*Gould I*).

Petitioner's husband had been murdered by a bullet to the middle of the back of his skull — a typical execution-type slaying, in a public park. There was no suicide note. There were no known witnesses. All evidence as to manner of death was circumstantial. All facts and circumstances were consistent with homicide. MONY nevertheless rejected petitioner's claim, asserting the policy suicide exception.

Petitioner sued MONY for the policy benefits in the state court and obtained a judgment. MONY appealed the judgment solely in an effort to persuade the state Supreme Court to reverse a long line of decisions holding that an insurer must have evidence to prove suicide to a certainty before lawfully invoking the suicide

exception — that it is not enough to say the evidence is debatable. The state Supreme Court refused to overrule its prior decisions.[1] MONY unsuccessfully petitioned for reconsideration. These maneuvers delayed the widow's recovery for over five years.

Israel and Bailey not only acted as MONY's attorneys, but also made the decision to deny petitioner's claim without reasonable justification, as well as initiating and approving conduct designed to intimidate and harass petitioner in an effort to persuade her to abandon her claim or settle for a mere fraction of the policy benefits. MONY paid Israel and Bailey over $46,000.00. Petitioner's attorney was required to devote in excess of 1,000 hours to protect the widow's rights. MONY and its attorneys assert that their actions were motivated as a matter of "principle."

Following *Gould I*, petitioner instituted this action in state court. The state trial court dismissed the marital communities of Israel and wife and Bailey and wife on the grounds that attorneys have immunity for their WCPA torts and that a widow insurance beneficiary has no standing to sue under WCPA. Petitioner appealed that order of dismissal the same day it was entered.

MONY then removed to the federal District Court alleging that it was now the only defendant and that there was diversity between MONY and petitioner. Petitioner moved for remand or stay pending the resolution of the appeal from the state court order dismissing Israel and Bailey. The District Court ignored the local law that the appeal to the state appellate court suspended the order dismissing Israel and Bailey, and refused to remand or stay the proceedings, although it was clear that federal jurisdiction was — at the least — uncertain.

The District Court then granted MONY a summary judgment dismissal on the ground that to enforce WCPA would have a chilling effect on insurers defending suits on rejected claims. (App. B). Petitioner appealed to the Ninth Circuit.

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[1] *Gould* v. *MONY*, 99 Wn.2d 722, 629 P.2d 1331 (1981) [*Gould I*]

While the appeal in the Ninth Circuit was pending, the State Court of Appeals handed down its judgment reversing the trial court dismissal of Israel and Bailey (App. C), reinstating them as proper defendants, as well as rejecting both the theory that attorneys have immunity and that a widow beneficiary has no standing to sue under WCPA.

The judgment of the state Court of Appeals (App. C) became final under state law when respondents did not petition the state Supreme Court for review. RCW 2.06.030 (App. D).

The state appellate court decision was promptly furnished to the Ninth Circuit. Sixty-three days later the Ninth Circuit affirmed the District Court grant of summary judgment against petitioner, ignoring the fact that the identical local law issue had been resolved in a final state appellate court judgment, and in so doing held that MONY did not need the proof of suicide to a certainty as required by local law. This Petition for Certiorari follows.

V. FEDERAL JURISDICTION

Petitioner contends under the first question that federal courts never had jurisdiction in the first place, which became perfectly clear when the final judgment of the state court of appeals reversed the dismissal of the non-diverse party defendants. However, since the Ninth Circuirt refused to recognize the lack of diversity, even when pointed out in unmistakable language, this Court has the jurisdiction to reverse and remand under its power of supervision.

VI. REASONS FOR GRANTING THE WRIT

In a clear violation of the statutes limiting federal jurisdiction, the District Court accepted removal and proceeded with the case when the requisite diversity of citizenship was lacking or uncertain, and the Ninth Circuit ignored the obvious jurisdictional defect when it was made clear by the state appellate court judgment. The case at bar also presents a flagrant example of the inequities the doctrine of *Erie Ry* v. *Tompkins,* 304 U.S. 64 (1938), sought

to prohibit. Under the Ninth Circuit decision (App. A) a foreign underwriter, with the right to remove to a federal court could invoke the suicide exception based only on "principle," suspicion or conjecture, while a state domiciled insurer forced to defend in the state court would be required to prove suicide to a certainty. The practical result is that all a man buys with his life insurance premiums paid to a foreign underwriter is a bitter and expensive law suit for his widow. The local state law on the rights of a consumer is tersely summarized in *Salois* v. *Mutual of Omaha*, 90 Wn.2d 355, 581 P.2d 1349, 1351 (1978) as follows:

> "Although it has been established by the jury's verdict that she is entitled to recover under the policy and that Mutual of Omaha is guilty of bad faith in refusing to honor her claim for benefits, the necessity to employ and pay her attorneys has deprived plaintiff of an adequate recovery. Her victory is a pyrrhic one if a victory at all."

The *Salois* court remanded to the trial court for fixing damages and attorney's fees as provided under WCPA.

(a) The District Court did not have jurisdiction to accept removal and proceed with case while the state court dismissal of non-diverse citizens was not final (and was ultimately reversed).

Under local law, the appeal from the order dismissing the non-diverse citizen defendants suspended the order of dismissal. The non-diverse defendants were still parties to the action. See *In Re Brown*, 107 P.2d 1104, 6 Wn.2d 215, 235 (1940), quoted on page 13 *infra*.

Strawbridge v. *Curtiss*, 3 Cranch 267 (1806), and its progeny, as well as 28 U.S.C. 1332 and 1441, require diversity between plaintiff and all defendants. With non-diverse party defendants properly in the action, the *District Court had no jurisdiction*. Neither diversity nor jurisdictional requirements can be waived and the parties can not create jurisdiction by stipulation, by estoppel, or by failure to raise the issue. *Mansfield, C. & L.M. Ry.* v. *Swan*, 111 U.S. 379, 28 L.Ed. 462, 4 S.Ct.510 (1884); *McNutt* v. *G.M.A.C.*, 298 U.S. 178 80 L.Ed. 1135, 56 S.Ct.

780 (1935); *Louisville & N.R. Ry. Co.* v. *Mottley*, 211 U.S. 149, 53 L.Ed. 126, 29 S. Ct. 42 (1908). As these cases demonstrate, federal courts are courts of limited jurisdiction, and when the facts underlying jurisdiction are challenged, as they were here, "the burden is on the party claiming jurisdiction to demonstrate that jurisdiction of the subject matter exists." Wright, *Law of Federal Courts* (4th Ed. 1983) 23.

It was unlawful for the District Court to accept removal and to deny remand when dismissal of non-diverse co-defendants was involuntary[2] or at least a stay with knowledge that the dismissal was on appeal, or that federal jurisdiction was uncertain. Then, when the non-diverse defendants were reinstated by the state court of appeals (App. C), every vestige of federal jurisdiction evaporated. Despite the official communication to the Ninth Circuit that the Washington-citizen defendants had been reinstated by the final judgment of the state court of appeals, and the Ninth Circuit *knew* that diversity did not exist, it ignored its duty to remand.

This is a significant issue of law, fully supported by all the decisions of this Court. *See Southern Ry. Co.* v. *Lloyd*, 36 S.Ct.210, 239 U.S. 496, 60 L.Ed.402 (1916). Petitioner respectfully suggests that the federal courts below have allowed themselves to be duped by a multi-billion dollar corporation into ignoring the restrictions on federal jurisdiction. This issue should be authoritatively resolved by this Court to avoid any future frustrations on the issue. Chief Justice Burger commented in *Maness* v. *Meyers*, 419 U.S. 449 at 460 (1975):

> "Remedies for judicial error may be cumbersome but the injury flowing from an error generally is not irreparable, and orderly processes are imperative to the oepration of the adversary system of justice."

While this Court has the power to correct this error, the hardships it has caused are approaching the irreparable. It should not be allowed to happen again.

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[2]Moore, *Federal Practice* Vol. 1A, Sec. O.168 [3-5] pps. 597-598 (1983 Ed.)

(b) This case presents a flagrant violation of the *Erie Ry* v. *Tompkins* doctrine by refusing to follow the settled state local law that a life insurer cannot lawfully invoke the suicide exception unless it has proof of suicide to a certainty.

The decisions of the highest state court in Washington require that an insurer must have proof of suicide to a *certainty* to overcome the presumption against suicide. The gravamen of petitioner's complaint is that MONY and its de facto decision making officers did not have evidence to meet this standard. The rule of local law established by the highest state court is tersely explained in *Burrier* v. *MONY*, 63 Wn.2d 266, 387 P.2d 58 (1963), a case in which the facts are identical for all practical purposes with this case. The *Burrier* court authoritatively established that MONY had the burden of proving suicide in the following language:

> "Men do foolish things and they do dangerous things and they are careless and they die alone, unattended and forsaken, and why they die we sometimes never learn for we know only what we know. The jury did not know that Ralph Burrier took his life; *it was the defendant's burden to prove it.*" (emphasis supplied) [387 P.2d at 61].

Burrier mandates that the insurer must prove suicide to a certainty, with evidence that the manner of death was:

> "...consistent with the theory of suicide and at the same time inconsistent with any reasonable hypothesisis of death by accident or the act of another." [387 P.2d 61].

To emphasize the requirement that MONY must have proof of suicide to a certainty, the *Burrier* opinion further states:

> "*Both parties* to a life insurance policy are held to have *contracted with knowledge of the presumption against suicide*... the insured is entitled to know, as a contracting party, that in the event of his death under inexplicable circumstances... or where as here, *the evidence can be viewed as consistent with suicide, the death will be presumed accidental rather than suicide*... If the presumption puts

> some added burden of proof than that prescribed by the ordinary burden of proof, *it is a burden held to have been contemplated by the parties when they made their contract of insurance with each other.*" (emphasis supplied) [387 P.2d at 63, 64].

In this WCPA suit, MONY does not contend that it ever had evidence of certainty required under the *Burrier* rule, but instead admits reliance upon suspicion and conjecture; it rejected the claim as a matter of principle. The record here contains a letter from Bailey to MONY's home office dated December 12, 1979 which states in part:

> "Vaughn Evans [plaintiff's counsel] contends an appeal is further evidence of bad faith. He stated in a telephone conversation today that Mutual Life Insurance Company of New York knew the state of the law on instructions involving the presumption against suicide, that they accepted premiums in accordance with the law and that he considers any appeal to be evidence of bad faith. It is distressing that he does not allow that the law on presumptions is in a state of flux and that he fails to see that the issue of law regarding instructions on presumptions is open to serious debate and that your decision to seek review in this matter is not based on economics but is rather *based on principle.*" (Emphasis supplied). (Excerpt of record on appeal page 202).

Under the decisions of the highest court of the state, an insurer must have reasonable justification for rejecting a claim. *Levy* v. *North Am. Co. for Life and Health Ins.*, 90 Wn.2d 842, 586 P.2d 845 (1978).

MONY's answer in the case at hand alleges that it had an honest belief that the death was suicide. Neither the terms of the policy nor Washington common law provide for a lawful rejection based on the suicide exception, solely on some unknown claim adjuster's belief, nor as a matter of principle. Proof of suicide to a certainty is required and without such proof of certainty the rejection is without justification.

The highest court of the State of Washington has held that the wrongful rejection of a claim violates both the Washington Insurance Code, RCW 48.01.030 and WCPA. See *Salois* v. *Mutual Life of Omaha Ins. Co.*, 90 Wn.2d 355, 681 P.2d 1339 (1978).

Despite the local law that an insurer must have proof of suicide to a certainty, the Ninth Circuit affirmed the District Court with the acknowledgment that the cause of death was "inconclusive" and that there was "extreme uncertainty surrounding Vick's death."[1] If a jury were to reach the same conclusion in the trial of this action, it would be compelled, under Washington law, to return a verdict for petitioner.

By refusing to follow the state law as set out in *Salois* and *Levy*, as well as *Burrier*, the federal courts below have not only violated the mandate in *Erie Ry.* v. *Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938), but have also violated 28 U.S.C. 1652. This presents a flagrant case of a federal court invading the judicial authority granted to the state and the denial of the state's independence. As stated in *Erie Ry.* v. *Tompkins*, this constitutes an unconstitutional assumption of powers by courts of the United States.

(c) The Ninth Circuit should have recognized it could not rely on a state court opinion in which reconsideration had been granted and which was in fact withdrawn.

The Ninth Circuit opinion, App. A at A-3, A-4, and A-5, relies on the state Supreme Court opinion in *Schroeder* v. *Royal Globe Ins. Co.*, 99 Wn.2d 65, 659 P.2d 509 (1983), as being the law of the state. Yet, as recognized by the Ninth Circuit opinion at A-3 and A-4, the state supreme court had granted reconsideration in that case. Under local law, the mere filing of a motion for reconsideration suspends an opinion. Here, not only had there been a motion for reconsideration, *but it had been*

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[1] *Gould* v. *MONY*, 735 F.2d 1165 (9th Cir-1984) [*Gould III*], App. A. at A-4

granted. The rule of local law of the highest state court in *In re Brown*, 6 Wn.2d 215, at 235 (1941) states:

> "In *Hutchings* and *Dishman* cases, petitions for rehearing having been granted, the departmental opinions were 'vacated' as provided by the statute above quoted. In the case at bar, *the opinion was suspended by the filing of the petition for rehearing*. In neither instance did the opinion ever become final; *the moment for the entry of judgment by this Court never arrived*. Insofar as the questions here presented are concerned, whether an opinion be vacated or suspended, the result is the same." (Emphasis supplied).

The Ninth Circuit refused to recognize, not only that the *Schroeder* opinion had been suspended, as stated in its published opinion, but that *before it rendered its opinion,* the highest court of the State had withdrawn section III of that decision (which deals with WCPA), and held it to have no precedential value whatsoever. See 101 Wn.2d 830, 683 P.2d 183 (1984). Despite the withdrawal of the only vestige of authority upon which the Ninth Circuit could base its opinion, it nevertheless cites *Schroeder* as authority for its usurpation of the state court's independence.

This too, is a flagrant violation of the authority and jurisdiction of the federal courts under both *Erie* and 28 U.S.C. 1652.

(d) Both the District Court and the Ninth Circuit should have certified what they considered unclear issues of local law to the state Supreme Court under the local Law Certification Act.

Both the District Court and the Ninth Circuit were requested to certify the issues of local law to the state Supreme court under the state uniform certification of question act, RCW 2.60.020. See A-4. They refused to do so.

This statute permits "any federal court" to "ascertain the local law" of this state in a case in which "the local law has not been clearly determined" by certifying "to the supreme court" of this state "the question of local law involved." The state supreme court must then "render its opinion in answer thereto."

This Court has enthusiastically shown its approval of the use of such certification statutes to ascertain local law. *Clay* v. *Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964); *Lehman Bros.* v. *Shein*, 416 U.S.386 (1974). Indeed, in the *Lehman Bros.* case, although the court said resort to such statutes is not obligatory, and that their use rests in the sound discretion of the federal court, the certification process "does, of course, in the long run save time, energy and resources and helps build a cooperative judicial federalism." 416 U.S. at 391. The Court then held it was error for the courts below not to use the certification statute. In this case, it was error for the courts below not to use the certification statute to satisfy their obligation under *Erie Ry* v. *Tompkins*, 304 U.S. 64 (1938), to ascertain and follow local law.

While petitioner contends the local law is clear that WCPA provides for recovery when an insurer denies a claim without reasonable justification, if the federal courts had any doubt its application to the facts here the issue should have been certified.

(e) The Federal court violated the doctrine of collateral estoppel by judgment when it relitigated the identical issue settled by the final state court judgment.

The legal issue of whether MONY as well as its attorneys would be liable under WCPA for rejecting petitioner's claim, when they had no evidence to prove suicide to a certainty, was fully litigated to a final judgment in *Gould* v. *MONY*, 37 Wn.App.756, 683 P.2d 207 (1984) [*Gould* II] App.-C. That opinion states at App C-4:

> "The allegations of Gould's complaint state a basis which, if proven, would permit a finding of liability against Mutual [MONY]."

The gravamen of petitioner's complaint is that MONY and its attorneys rejected petitioner's claim without having any evidence required under local law to prove suicide — i.e., evidence of suicide to a certainty required under *Burrier* v. *MONY*, 63 Wn.2d 266, 387 P.2d 58 (1963). The Ninth Circuit was officially informed of the final judgment of the state Court of Appeals (App-C) before rendering its decision. (App-A)

The doctrine of collateral estoppel by judgment precludes the federal court from relitigating issues which have been conclusively put to rest by the final state court judgment. *Montana* v. *United States*, 440 U. S. 147, 54 L.Ed 2d 210, 99 S.Ct. 970 (1979). All the elements of estoppel by judgment are here present. There is privity between MONY and its attorneys; the identical issues were presented and decided; there has been no change in the substantive law; there has been no change in the facts; there is no moral or ethical reason why MONY should have a second chance to litigate.

The federal courts are precluded from relitigating these issues, in particular in holding that an insurer does not act in bad faith when, in reliance on uncertainties, it invokes the suicide exception to reject a claim.

Respectfully submitted,

Vaughn E. Evans
Attorney for Petitioner

APPENDIX A

735 F.2d 1165 [*Gould III*]

HARRIET M. GOULD,
Plaintiff-Appellant,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
Defendant-Appellee.

No. 83-3790.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.
Argued and Submitted Jan. 4, 1984.
Decided June 25, 1984.

TANG, Circuit Judge:

FACTS

In May 1976, Vick Gould was found shot to death in a public park in Bellevue, Washington. He was killed by a bullet that entered through the base of his skull. Vick was insured under a life insurance policy issued by Mutual Life Insurance Company of New York ("MONY"). The policy insured against accidental death, but excluded death by suicide. Plaintiff Harriet Gould, the insured's widow and beneficiary of the policy, submitted a claim to collect the $25,000 proceeds of the policy. MONY refused payment, claiming that the death was by suicide.

Plaintiff then brought an action in state court to enforce the policy. MONY raised the policy's suicide exclusion clause as an affirmative defense. The jury returned a verdict for plaintiff and, on appeal, the Washington Supreme Court affirmed. *Gould v. Mut. Life Ins. Co.*, 95 Wash.2d 722, 629 P.2d 1331 (1981) (en banc).

Thereafter, plaintiff brought an action in state court pursuant to the Washington Consumer Protection Act, Wash.Rev.Code § 19.86.020, seeking damages and attorney's fees, based on MONY's alleged bad faith refusal to honor the life insurance policy claim. The case was then removed to the United States District Court for the Western District of Washington. The federal trial court held, as a matter of law, that MONY's denial of policy benefits was neither frivolous, nor unfounded and granted summary judgment in favor of the insurance company. The court also denied a postjudgment motion for relief from judgment and a further motion for leave to amend the complaint to allege outrage. Plaintiff timely appeals.

ANALYSIS

I. *Summary Judgement*

[1] Our review of the grant of summary judgement on a question of law is *de novo*. *Walker v. Navajo-Hopi Indian Relocation Comm'n*, 728 F.2d 1276 (9th Cir. 1984). We must determine that there is no genuine issue of material fact and that the party moving for summary judgement should prevail as a matter of law. *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 677 (9th Cir.1984).

Washington's Consumer Protection Act prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ." Wash.Rev.Code § 19.86.020. Any person injured by a violation of that prohibition may recover actual damages, costs of suit (including attorney's fees), and punitive damages. Wash.Rev.Code § 19.86.090.

[2] An insurer's breach of its duty to deal with an insured

in good faith constitutes a violation of the Consumer Protection Act. *Levy v. North Am. Co. for Life and Health Ins.*, 90 Wash.2d 846, 848, 586 P.2d 845, 847-48 (1978) (citing *Salois v. Mut. of Omaha Ins. Co.*, 90 Wash.2d 355, 581 P.2d 1349 (1978)). Yet "the mere denial of benefits due to a debatable question of coverage is insufficient" to demonstrate bad faith. *Miller v. Indiana Ins. Cos.*, 31 Wash.App. 475, —, 642 P.2d 769, 771 (1982).

[3] In the case at bar, the facts reveal, as a matter of law that there was a debatable question of coverage, which provided the insurance company with a reasonable and valid ground on which to oppose payment of the proceeds of the policy. *See Phil Schroeder, Inc. v. Royal Glode Ins. Co.*, 99 Wash.2d 65, 74, 659 P.2d 509, 514 (1983) (en banc), *reconsid'n granted*, 99 Wash.2d 1019 (May 31, 1983).

MONY had available to it considerable evidence pointing to suicide. This evidence included, *inter alia:* Vick's gloves were determined to have been used to fire a gun; a revolver belonging to the deceased was found beside the body; the bullet that killed Vick was of the same caliber and composition as the unfired cartridges in his revolver; Vick discussed suicide on a couple of occasions with a friend and discussed life insurance coverage in case of suicide.

We recognize that there also was evidence that was inconsistent with suicide. Such evidence raises a genuine issue of material fact as to how Vick died. In view of the above contravening evidence, however, it does not raise a material question as to MONY's good faith.

In its en banc review of the *Gould* case, the Supreme Court of Washington noted that "[a]t trial evidence was produced to support both theories [homicide and suicide]." *Gould*, 95

Wash.2d at 723, 629 P.2d at 1331. Moreover, the trial court denied both plaintiff's motion for summary judgment and motion for a directed verdict on the suicide defense issue.

We acknowledge that the evidence as to the cause of death was sufficiently inconclusive as to require a jury determination. Yet no evidence of MONY's alleged bad faith has been presented and the extreme uncertainty surrounding Vick's death raised a debatable question of coverage as a matter of law.

II. *Amendment to Allege Outrage*

Plaintiff challenges the district court's refusal to grant leave to amend the complaint to allege the tort of outrage. The petition for leave to amend was included in plaintiff's postjudgment motion for relief.

[4,5] An insurer's refusal to pay policy benefits may involve conduct constituting the tort of outrage. *Rounds v. Union Bankers Ins. Co.*, 22 Wash.App. 613, 614, 590 P.2d 1286, 1287-88 (1979). Yet MONY's conduct cannot "reasonably be regarded as . . . extreme and outrageous . . . ." *Id* at 617, 590 P.2d at 1288. Amendment of the complaint would, therefore, have been futile and the district court's refusal to grant leave to amend was proper.

III. *Certification to the State Court*

[6] Plaintiff also renews her motion to certify the present appeal to the Washington Supreme Court. That court recently reiterated the reasonableness standard as the measure that is to be applied to determine good faith under the Washington Consumer Protection Act. *Schroeder*, 99 Wash.2d at 73, 659 P.2d at 514. The court has since granted reconsideration of *Schroeder*. Although it is unclear, plain-

tiff's certification motion is apparently the result of this decision.

The motion must be denied. No compelling reason to use that procedure has been identified. The reasonableness standard articulated in *Schroeder* is a reiteration of the standard established in *Levy*, 90 Wash.2d 846, 586 P.2d 845. There is no reason to believe that the court would modify the reasonableness requirement on reconsideration of the particular facts in *Schroeder*.

IV. *Other Issues*

[7] Plaintiff complains of a pattern of unfair practices by MONY, in violation of the Washington Administrative Code. She has shown no exceptional circumstances why this issue was not raised below. *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652 (9th Cir.1984). We therefore decline to pass on this question. *Komatsu, Ltd. v. States Steamship Co.*, 674 F.2d 806, 812 (9th Cir.1982).

[8] Plaintiff also complains because the district court did not compel discovery before granting summary judgement. Although plaintiff requested imposition of sanctions, no motion to compel discovery was presented.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HARRIET M. GOULD,
Plaintiff,
v.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

No. C82-230R

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
MARCH 1, 1983
BRUCE RIFKIN, *Clerk*
By . *Deputy*

THIS MATTER comes before the court on plaintiff's motion for summary judgment on the issue of liability and defendant's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, or in the alternative, for summary judgment. Matters outside the pleadings have been presented in support of defendant's motion, the motion will be treated as one for summary judgment. R. 12(b). No material facts are in dispute.

Vick Gould was found shot to death in Robinswood Park in Bellevue, Washington on May 27, 1976. He was insured under a group life insurance policy issued by defendant Mutual Life Insurance Company of New York (MONY). The policy insured against accidental death but excluded any loss resulting from suicide.

Harriet Gould, the insured's widow and beneficiary of the policy, submitted a claim for the $25,000 in policy benefits. MONY denied payment on the ground that the death had resulted from suicide. Plaintiff instituted a lawsuit in the Superior Court of the State of Washington against MONY to obtain the $25,000. MONY asserted the suicide exclusion as an affirmative defense. Before trial, plaintiff moved for summary judgment against the defendant insurer. The motion was denied. At the close of the presentation of evidence plaintiff moved for a directed verdict. The court denied to motion, noting that evidence had been presented by defendant that would allow the jury to determine whether or not defendant has met its burden of proving suicide.

The jury returned a verdict in plaintiff's favor in the amount of $25,000. Defendant appealed. Plaintiff moved to dismiss the appeal as frivolous; the motion was denied. The Supreme Court of Washington affirmed the judgment. *Gould v. Mutual Life Insurance Company of New York*, 95 Wn. 2d 722 (1981).

Plaintiff brings this action against defendant under the Washington Consumer Protection Act, "seeking recovery of plaintiff's damages, attorneys' fees and punitive damages

as provided in RCW 19.86.090 for the bad faith refusal of MONY to honor plaintiff's claim." Plaintiff's Memorandum in Support of Two Motions (Dec. 27, 1982) at 2-3. Plaintiff's theory of recovery begins with the assertion, not disputed by defendant for purposes of this motion, that the insured and the carrier contracted with knowledge of the presumption against suicide and of the carrier's burden, in order to utilize the suicide exclusion, of proving that death occurred in a manner inconsistent with accident. *See Gould v. Mutual Life Insurance Company of New York*, 95 Wn. 2d at 725; *Burrier v. Mutal Life Insurance Co.*, 63 Wn. 2d 266 (1963). Plaintiff's theory continues with the following syllogism:

1. Unless the carrier has evidence sufficient to carry its burden, its denial of coverage was a violation of its fiduciary duty of good faith and fair dealing.

2. The carrier lacked evidence to carry its burden and litigated solely in an effort to change existing law.

3. The carrier breached its duty of good faith and fair dealing and is therefore liable under the Consumer Protection Act. *Salois v. Mutual of Omaha*, 90 Wn. 2d 355 (1978).

The court agrees with the defendant that plaintiff's major premise is erroneous. If plaintiff's theory were the law, every insurer that ultimately lost a lawsuit concerning coverage would be liable per se under the Consumer Protection Act. The chilling effect on insurers' rights of access to the courts would be obvious. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Rather, the rule is that mere denial of benefits due to a debatable ques-

tion of coverage is insufficient to show bad faith. *Miller v. Indiana Insurance Cos.*, 31 Wn. App. 475, 479 (1982); *Pruitt v. Alaska Pacific Assurance Co.*, 28 Wn. App. 802, 804-05 (1981). "Bad faith requires a showing of a frivolous and unfounded denial of benefits." *Miller*, 31 Wn. App. at 479. Absent such a showing, a carrier that refused payment under a policy cannot be held liable for that refusal under the Consumer Protection Act.

Plaintiff's claim of bad faith rests solely on the allegation that defendant refused, "without any evidence to support a defense of suicide," to pay under the policy, which resulted in plaintiff bringing the state court lawsuit. Complaint VI, VII. Unless that refusal was frivolous and unfounded, plaintiff's claim must fail.

The court is of the opinion that, as a matter of law, defendant's refusal to pay under the policy was neither frivolous nor unfounded. Persuasive in this regard is the statement of the Washington Supreme Court in the reported opinion affirming the judgement in favor of plaintiff:

> At trial evidence was produced to support both theories.

95 Wn. 2d at 723. Also significant is the pretrial ruling which denied plaintiff's motion for summary judgment, holding that a question of fact existed as to whether Vick Gould took his own life. Moreover after all the evidence in the case had

been presented, plaintiff moved for a directed verdict. Such a motion may be granted only where there is no competent evidence nor reasonable inference which would sustain a jury verdict in favor of the non-moving party. *Levy v. North American Insurance*, 90 Wn. 2d 846, 851 (1978). The motion was denied.

Plaintiff's argument that it cannot be bound by these determinations because of lack of identity of issues is plainly without merit. The only issue raised by the plaintiff's motions was whether there existed a debatable question of coverage sufficient to take the affirmative defense to the jury. And although the appeal was concerned with the propriety of the court's instruction to the jury on the presumption against suicide, the court recognized that evidence had been presented "to support" both theories, that is, that a jury verdict for defendant would have been legally possible. These questions were actually litigated by plaintiff and, as they placed in issue defendant's right to rely on the suicide exclusion, were essential to the judgment. *See Seattle-First National Bank v. Kowachi*, 91 Wn. 2d 223, 228 (1978); Defendant's Memorandum in Support of Motion for Dismissal (Dec. 28, 1982), Exhibits G & H. In sum, plaintiff cannot show that defendant's denial of policy benefits was frivolous and unfounded. Accordingly, defendant is entitled to summary judgement.

It is indeed unfortunate that MONY's war on the presumption had to be waged in Mrs. Gould's case. This is especially so since the amount at issue was relatively small and the costs, both emotional and financial, undoubtedly large. However, as a matter of law, the defense of this lawsuit, aggressive, costly and futile as it was, did not constitute a Consumer Protection Act violation.

Plaintiff's motion for summary judgment is DENIED. Defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

The Clerk of the Court is directed to enter judgment dismissing the complaint and to forward copies of this order and the judgment entered to counsel of record.

DATED at Seattle, Washington this 28th day of February, 1983.

s/s BARBARA J. ROTHSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HARRIET M. GOULD. *Plaintiff.* v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. *Defendant.*	No. C82-230R ORDER DENYING PLAINTIFF'S MOTIONS FOR RELIEF FROM JUDGMENT AND CERTIFICATION

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
APRIL 10, 1983
BRUCE RIFKIN, *Clerk*
By . . . . . , *Deputy*

ON MARCH 1, 1983 this court entered an order denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment. Judgment was entered dismissing the action March 2, 1983. Plaintiff now moves for relief from judgment pursuant to Fed. R. Civ. P. 59 and 60 and for certification of state law, issues to the Washington Supreme Court.

Plaintiff argues that the court's order holding plaintiff's Consumer Protection Act claim insufficient as a matter of law is riddled with errors. Plaintiff protests the court's use of a case not cited by the parties, claiming a deprivation of due process of law thereby. Plaintiff disputes the court's interpretation of Washington consumer protection law and the complaint, attempting to recharacterize her claim.

Plaintiff requests oral argument of unlimited duration and the opportunity to present yet another brief of excessive length.

The motions are without merit. This court's interpretation of applicable law was confirmed by the Washington Supreme Court in *Phil Schroeder, Inc. v. Royal Globe Insurance Co.*, 99 Wn. 2d 65, 74 (1983). There, the insurer's refusal to pay under a policy was based on its erroneous interpretation of policy language. Since the interpretation was debatable under prior law, however, the court refused to allow liability against the insurer under the Consumer Protection Act. Similarly, although defendant's theory of this case was ultimately not accepted by the jury, it was supported by evidence capable of sustaining a jury verdict. The Consumer Protection Act affords no remedy under these circumstances.

Plaintiff's motions for relief from judgment and for certification to the Washington Supreme Court are DENIED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 15th day of April, 1983.

s/s BARBARA J. ROTHSTEIN
United States District Judge

APPENDIX C

37 Wn.App.756,683 P.2d 207 (1984) [*Gould II*]

HARRIET M. GOULD,
Appellant,
v.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant,
ROBERT L. ISRAEL, ET AL,
Respondents.

No. 11463-8-I.
Division One.
April 23, 1984.

SCHOLFIELD, J. — Harriet M. Gould appeals a final judgment dismissing her complaint against Robert L. Israel and C. William Bailey, their wives and respective marital communities. We reverse.

Israel and Bailey brought a motion for judment on the pleadings to dismiss Gould's complaint. They specifically alleged and rely on the provisions of CR 12(b)(6), which permits a party to move for dismissal of a claim against him for "failure to state a claim upon which relief can be granted".

Because of the nature of the motion, we refer to the pertinent portions of Gould's "First Amended Complaint", wherein she alleges:

1. She is sole beneficiary on an accidental death insurance policy issued on the life of her now deceased husband by the defendant, Mutual Life Insurance Company of New York.

2. That without any evidence to support a defense of suicide, defendant Mutual and its attorneys and agents Israel and Bailey made a decision to refuse to pay the death benefits due Gould and forced her to press her claim through trial and appeal to the Supreme Court, where she ultimately prevailed.

3. That the actions of Israel and Bailey were not limited to rendering services as attorneys of Mutual, but included participation in and managing the wrongful and bad faith conduct as agents of Mutual Life Insurance Company of New York, including, but not limited to, making command decisions to wrongfully and in bad faith deny plaintiff's claim, initiating and approving conduct designed solely to harrass [*sic*] and humiliate plaintiff and cause her mental distress, with intent to intimidate plaintiff into abandoning her claim or settling for a mere fraction of the benefits to which plaintiff was entitled and for which plaintiff had paid premiums.

4. That the conduct of each of the defendants constituted bad faith and unfair and deceptive acts and practices in violation of the Consumer Protection Act, RCW 19.86.

Gould first contends that the dismissal of Israel and Bailey was not a final judgment and did not terminate the action as to them because the record is insufficient to support the findings required by CR 54(b) "that there is no just reason for delay", citing *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 567 P.2d 230 (1977). A motion to that effect was presented to Court of Appeals Commissioner Jordan and denied April 22, 1982. Because Gould did not move to modify that ruling pursuant to RAP 17.7, the ruling of the commissioner became the final decision of the court.

Israel and Bailey contended that there is no possible basis for a cause of action against them by Gould because Gould is not an insured, only a beneficiary, on the policy. In making this argument, they rely upon *Rice v. Life Ins. Co. of N. Am.*, 25 Wn. App. 479, 609 P.2d 1387 (1980). In *Rice*, the Court of Appeals stated in dicta that one who is not an insured does not have a cause of action against an insurance company under the Consumer Protection Act.

[1] The sole authority cited for this proposition was the case of *Rounds v. Union Bankers Ins. Co.*, 22 Wn. App. 613, 590 P.2d 1286 (1979). We read the language from the *Rounds* opinion, cited and relied upon in *Rice*, as holding that there was a legislative intent to provide a remedy for an *insured* who suffers damages due to conduct such as that alleged against the defendant in that case. The *Rounds* opinion does not address the question of whether a beneficiary to a life insurance policy would or would not have a cause of action against the life insurance company under the Consumer Protection Act.

If an insured has a cause of action against an insurance campany for bad faith in the manner in which the insurance company processes a claim against it, there is nothing in the language of the Consumer Protection Act to suggest that a beneficiary of a policy would not also have a cause of action against the insurance company under similar circumstances. Because there is no logical basis upon which to distinguish Gould from the insured under the circumstances of this case, we decline to hold that a beneficiary of a life insurance policy does not have a cause of action against the insurer under the Consumer Protection Act for bad faith in settling her claim.

[2] In addressing a motion to dismiss under CR 12(b)(6), our Supreme Court stated:

> We have repeatedly said that a motion made pursuant to CR 12(b)(6) must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. *Halverson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). Factual allegations of the complaint must be accepted as true for purposes of the CR 12(b)(6) motion. *Berge v. Gorton, supra* at 759; *Standard v. Bolin*, 88 Wn.2d 614, 615, 565 P.2d 94 (1977); . . .

Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wn.2d 959, 961-62, 577 P.2d 580 (1978).

[3] The law is clear that corporate officers and agents can incur personal liability under the Consumer Protection Act, RCW 19.86.140, *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976), *appeal dismissed*, 430 U.S. 952 (1977), and that an insurance company which breaches its duty to act in good faith is subject to liability under the act. *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978).

The allegations of Gould's complaint state a basis which, if proven, would permit a finding of liability against Mutual.

RCW 19.86.020 provides:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

The complaint charges Mutual with acting wrongfully and in bad faith in denying Gould's claim.

The issue here, however, is whether the complaint states grounds upon which, if proven, Gould could be granted a

recovery against Israel and Bailey and their respective marital communities. In support of their motion to dismiss, Israel and Bailey emphasize that they are attorneys at law and all their actions in this case were done as attorneys representing their client, Mutual.

The complaint, however, alleges that Israel and Bailey acted outside the scope of the normal and traditional role of an attorney representing a client. The complaint alleges specifically:

> That the acts and conduct of defendants Robert L. Israel and C. William Bailey were not limited to services of attorneys, but included participation in and managing the wrongful and bad faith conduct as agents of Mutual Life Insurance Company of New York, including, but not limited to, making command decisions to wrongfully and in bad faith deny plaintiff's claim, initiating and approving conduct designed solely to harrass [*sic*] and humiliate plaintiff and cause her mental distress[.]

For the purposes of this motion, these allegations must be accepted as true. If the allegations are correct, then Bailey and Israel acted as de facto corporate officers and in that capacity engaged in conduct for which personal liability can be imposed. We believe this to be the fair intendment of the complaint. It follows that the fact that Israel and Bailey are attorneys at law would not protect them from liability imposed on proof of the allegations of the complaint.

Under these circumstances, a judgment of dismissal under CR 12 cannot lie.

Judgment reversed and remanded for further proceedings.

WILLIAMS, J., and SODERLAND, J. Pro Tem., concur.

Reconsideration denied June 12, 1984.

APPENDIX D

RCW 2.06.010. Court of appeals established—Definitions

There is hereby established a court of appeals as a court of record. For the purpose of RCW 2.06.010 through 2.06.100 the following terms shall have the following meanings:

. . .

(3) "Court " means court of appeals.

RCW 2.06.030. General powers and authority—Transfers of cases—Appellate jurisdiction, exceptions—Appeals

The administration and procedures of the court shall be as provided by rules of the supreme court. The court shall be vested with all power and authority, not inconsistent with said rules, necessary to carry into complete execution all of its judgements, decrees and determinations in all matters within its jurisdiction, according to the rules and principles of the common law and the Constitution and laws of this state.

For the prompt and orderly administration of justice, the supreme court may (1) transfer to the appropriate division of the court for decision a case or appeal pending before the supreme court; or (2) transfer to the supreme court for decision a case or appeal pending in a division of the court.

Subject to the provisions of this section, the court shall have exclusive appellate jurisdiction in all cases except:

(a) cases of quo warranto, prohibition, injunction or mandamus directed to state officials;

(b) criminal cases where the death penalty has been decreed;

(c) cases where the validity of all or any portion of a statute, ordinance, tax, impost, assessment or toll is drawn into question on the grounds of repugnancy to the Constitution of the United States or of the state of Washington, or to a statute or treaty of the United States, and the superior court has held against its validity;

(d) cases involving fundamental and urgent issues of broad public import requiring prompt and ultimate determination; and

(e) cases involving substantive issues on which there is a direct conflict among prevailing decisions of panels of the court or between decisions of the supreme court;

all of which shall be appealed directly to the supreme court: *Provided*, That whenever a majority of the court before which an appeal is pending, but before a hearing thereon, is in doubt as to whether such appeal is within the catagories set forth in subsection (d) or (e) of this section, the cause shall be certified to the supreme court for such determination.

The appellate jurisdiction of the court of appeals does not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars.

The court shall have appellate jurisdiction over review of final decisions of administrative agencies certified by the superior court pursuant to RCW 34.04.133.

Appeals from the court to the supreme court shall be only at the discretion of the supreme court upon the filing of a petition for review. No case, appeal or petition for a writ filed in the supreme court or the court shall be dismissed for the reason that it was not filed in the proper court, but it shall be transferred to the proper court.